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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

NO. 8, ORIGINAL.

EX PARTE: IN THE MATTER OF JOHN BONNER, PETITIONER.

PETITION FOR A WRIT OF HABEAS CORPUS.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE APPLICATION.

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STATEMENT OF THE CASE.

The petitioner was convicted of larceny under Revised Statutes, section 5356, in the United States court for the third judicial division of the Indian Territory; and on May 9, 1893, was sentenced to "be imprisoned in the United States penitentiary situated in Anamosa, in the State of Iowa, for the term and period of one year, and that he pay to the United States of America a fine of one thousand dollars, and that they have execution therefor."

one of the alternative judgments prescribed by the statute, in the payment of the fine of $200, and that he could not, therefore, be properly adjudged to undergo imprisonment. Mr. Justice Miller said (p. 176):

> The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end.

But the learned justice took occasion to say that the original judgment, in awarding the excessive punishment of both fine and imprisonment, was not for that reason void, but only erroneous. He said (p. 174):

> The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void.

In *Ex parte Parks* (93 U. S., 18, 23), Mr. Justice Bradley thus stated the ground of the judgment in the case of Lange:

> In *Ex parte Lange* we proceeded on the ground that when the court rendered its second judgment the case was entirely out of its hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void.

In *Sennott's Case* (146 Mass., 489, 493), Knowlton, J., said of the case of Lange:

> The leading cases of *Ex parte Lange* (18 Wall., 163) and *People* v. *Liscomb* (60 N. Y., 559) do not decide that a sentence which is merely erroneous and excessive through a mistake of law is void, in such a sense as to make an officer liable for executing it, or to call for a discharge upon habeas corpus of a person held under it. Indeed, in the former case, Mr. Justice Miller, in his opinion, at page 174, asserts that it is not. The principle upon which this case goes is, that when a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed in whole or in part, it has no jurisdiction to impose another, either in addition to or in substitution for the first. And the case of *People* v. *Liscomb* rests on similar grounds. (See also *People* v. *Jacobs*, 66 N. Y., 8.)

Ex parte Parks was not the case of an excessive sentence, but of sentence under an indictment which, it was claimed by the petitioner, charged him with no crime against the laws of the United States; but this court held that that was a question which the trial court had jurisdiction to determine, and a writ of habeas corpus was accordingly denied. The case is surely no authority for the proposition that an excessive sentence is a void sentence. No case to that effect was cited by Mr. Justice Bradley, and no countenance to such a view was given by anything said in his opinion. On the contrary, after citing, in addition to *ex parte* Lange, *ex parte Kearney* (7 Wheat., 38) and *ex parte Wells* (18 How., 307), in both of which writs were denied, and in the first of which the rule, that habeas corpus can

not be used as a writ of error, was declared in the strongest terms by Mr. Justice Story, Mr. Justice Bradley said (p. 23):

> But if the court had jurisdiction and power to convict and sentence, the writ can not issue to correct a mere error.

And again:

> But, in the case before us, the district court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of the writ of habeas corpus would be to convert that writ into a mere writ of error and to assume an appellate power which has never been conferred upon this court.

In *Ex parte* Virginia it was claimed that the act under which the prisoner was arrested was unconstitutional, but this court held otherwise and denied the writ. The case of *Coy* is to the same effect, the court denying the writ and refusing to consider the sufficiency of the indictment.

In *Hans Nielsen, petitioner*, the prisoner was convicted and sentenced for the crime of adultery, which was included in the crime of unlawful cohabitation for which he had previously been convicted and punished, and this court ordered his discharge, upon the ground that the trial court was without jurisdiction to render *any* judgment, the prisoner having already been convicted of the same offense.

Having endeavored thus to show, by an analysis of the cases cited in *Ex parte* Mills, that none of them support the doctrine announced in that case—that an excessive

sentence upon a lawful conviction is void—I beg to refer the court to several well-considered cases in which the opposite rule has been expressly adjudicated.

In *Sennott's Case* (146 Mass., 489), which involved a sentence not in accordance with the statutes, and in which the court refused a habeas corpus, Knowlton, J., said (pp. 492, 493):

> The better rule seems to be, that where a court has jurisdiction of the person, and of the offense, the imposition by mistake of a sentence, in excess of what the law permits, is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error. *Ross's Case*, 2 Pick., 165; *Feeley's Case*, 12 Cush., 598, 599; *Semler, petitioner*, 41 Wis., 517; *Ex parte Shaw*, 7 Ohio St., 81; *Ex parte Van Hagan*, 25 Ohio St., 426; *Phinney, petitioner*, 32 Maine, 440; *Kirby* v. *State*, 62 Ala., 51; *Lark* v. *State*, 55 Ga., 435.

Ex parte Shaw (7 Ohio State, 81) was a case of habeas corpus for the release of a prisoner sentenced to imprisonment for one year, under a statute which required a sentence for a period of not less than three years. Swan, J., said (p. 82):

> Does this render the sentence void and the commitment of the relator unlawful? The question is one simply of jurisdiction. The court had jurisdiction over the offense and its punishment. It had authority to pronounce sentence; and, while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous. * * * But if the court had sentenced the relator for an offense over which, by law, it had no juris-

> diction whatever, so that the proceedings and sentence were manifestly *coram non judice* and void, the imprisonment following such void sentence would have been unlawful, and the relator entitled to be discharged on habeas corpus.

A similar rule was applied in *Ex parte* Van Hagan (25 Ohio St., 426) where the petitioner, upon a lawful conviction had been erroneously sentenced to imprisonment in the workhouse for six months, instead of to thirty days in the dungeon of the county jail, as prescribed by the statute; and in *Williams* v. *State* (18 Ohio St., 46) where the sentence was vague and indefinite, being imprisonment for "ten years, to commence at the expiration of the sentence aforesaid," there being nothing in the record showing to what the term "aforesaid" related, the court remanded the case "for judgment and sentence upon the verdict of the jury pursuant to law," with this observation (p. 49):

> As the error in this case is only in the insufficiency of the judgment and sentence of the court, the reversal will not affect the validity of the conviction.

In re Graham and *In re* McDonald (74 Wis., 450,) (1889), the petitioners applied for writs of habeas corpus, claiming to have been sentenced respectively to imprisonment in the State prison for thirteen and fourteen years, when the act under which convictions were had permitted imprisonment for not more than ten years nor less than three years. The court said:

> We deny the writs for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of

> habeas corpus. The judgments are doubtless erroneous and would be reversed on writ of error. But the judgments are not void. The court had jurisdiction of the persons and subject matter or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of errors in law or irregularities in the proceedings.

The prisoners applied a second time for writs, but they were refused (76 Wis., 366). Graham then applied to this court (*In re Graham*, 138 U. S., 461), but his application was denied on the ground that there was no federal question involved.

In *Elsner* v. *Shrigley* (80 Iowa, 30) (1890), the plaintiff was convicted of maintaining a nuisance and sentenced to pay a fine of $300 and costs, including an attorney's fee of $50. The judgment further provided for imprisonment for failure to pay, at hard labor, until the fine and costs were paid. The prisoner sued out a writ of habeas corpus, claiming that the judgment was void, because it failed to fix the time for which he was to be imprisoned. The court said (p. 34):

> It is not, of course, to be understood that a court has acted in a lawful manner when the judgment it pronounces is absolutely void, for such a judgment has no support in the law. Neither the law in its substance nor "manner or form" can aid it. But if it is merely voidable it has support until set aside in a proper proceeding. The court in that proceeding had jurisdiction of the subject matter and of the person. It had the right to impose a fine, and pro-

> vide for imprisonment until the fine was paid. In so doing it could not make the imprisonment exceed one day for each three and one-third dollars. If the judgment exceeded the limit of the law, it would be void as to the excess, but not as to the remainder. (*People* v. *Jacobs* 66 N. Y., 8); *People* v. *Baker* (89 N. Y., 460). Conceding that the court could, under the language of the statute, make the imprisonment less than the rate named, it could not make it more, and within the limits it possessed a discretionary power, and in the erroneous exercise of such a power a court can not generally, if ever, be said to be acting in an unlawful manner, nor are such acts generally, if ever, absolutely void.

In the next paragraph the court said that the failure of the trial judge to fix a definite term of imprisonment "made the judgment erroneous, but not void, and the law on appeal afforded the plaintiff ample protection." And they "reached the conclusion that habeas corpus is not available to question the correctness of the proceedings of the district court with reference to the judgment in question," and affirmed the judgment, remanding the petitioner to custody, citing many authorities (p. 36).

In *Ex parte* Max (44 Cal., 579), (1872), Max petitioned to be discharged, on habeas corpus, because he was sentenced as for conviction of a felony when he was convicted of a misdemeanor merely. His counsel contended that the judgment was absolutely void, and conferred no authority to the warden to detain the petitioner. The court said (p. 581):

> We are of opinion, however, that the position can not be maintained. The indictment upon which judgment is founded is sufficient in all respects; the

> offense of which the prisoner was convicted was one within the scope of the indictment, and the judgment one which the county court had the authority to render upon the appearance and plea of the petitioner. These conditions constitute jurisdiction; all others involve questions of mere error, and the latter can not be inquired into upon writ of habeas corpus, but only upon proceedings in error.

In *People* vs. *Kelly* (97 N. Y., 212), an application was made for a writ of habeas corpus by a prisoner who had been convicted of an assault in the third degree, and sentenced to imprisonment at hard labor in the state prison for the term of one year. The court of appeals held that the offense was a misdemeanor, and punishable only by imprisonment for not more than one year, or by a fine of not more than $500, or by both. The case is one of an excessive sentence upon a valid conviction. But the court refused to discharge the petitioner, and remanded him to the sheriff in order that the trial court might deal with him according to law.

In *Ex parte* Bond (9 S. C., 80) (1877), the petitioner had been convicted of assault with intent to kill and sentenced to confinement in the penitentiary at hard labor. The court held that the offense was not punishable by confinement in the state penitentiary, and that the sentence was therefore erroneous, but that it was not void, and refused to discharge the prisoner on habeas corpus.

In re Petty, 22 Kans., 477 (1879), was an original proceeding in habeas corpus. The petitioner, for a murder committed in 1866, was sentenced, under an act of 1872,

which provided that a person sentenced to death was to be delivered to the warden of the penitentiary, under a warrant of a court pronouncing judgment, and kept at hard labor within the walls of the penitentiary until the warden received the order of the governor fixing the day on which the sentence of the law was to be carried into effect, which order should not be made before one year had elapsed from the time of conviction. Prior to the act of 1872, whenever any convict was sentenced to the punishment of death, the court appointed a day on which such sentence was to be executed, the day not being less than four nor more than eight weeks from the time of the sentence.

The court held that the prisoner was not subject to the punishment of the act of 1872; but that the trial court having had jurisdiction of the person of the prisoner and of the offense, the verdict was valid; that under the verdict he was liable to be sentenced to the punishment of death, and that the proviso in the sentence that the governor should set the day of the execution at a time not less than one year from the day of sentence "was an irregularity, or rather an erroneous order, to carry out the sentence of death, and not a void judgment."

The writ was denied, and the prisoner remanded to the custody of the warden.

In *Phinney, petitioner* (32 Me., 440) (1851), the sentence of the petitioner had erroneously ordered the fine to be paid to the State. The court, while recognizing the error, said: "Still the judgment is valid until reversed," and refused to discharge the prisoner.

The *People* vs. *Cavanaugh* (2 Parker's Crim. Rep., 650) was a case in habeas corpus for relief from an erroneous sentence of imprisonment. The court said (p. 662):

> There is no force in the point raised that Cavanaugh should have been sentenced to the penitentiary, and not to the county jail. We must assume that the *oyer* and *terminer* determined it had the power to pronounce the sentence under which he was imprisoned. If it was an error to designate the county jail as the place of his confinement, which I by no means assert, it can not be reviewed and corrected in this proceeding. It forms no ground for his discharge upon habeas corpus.

In *Ex parte Mooney*, 26 W. Va., 366, the writ was refused to a prisoner who had been improperly sentenced to both fine and imprisonment.

The sentence at bar is in accordance with the statute in the amount of the fine and in the term of the imprisonment imposed. It violates the statute only in the designation of the place of imprisonment. I beg to submit whether, in view of the provisions of title 70, chapter 9, of the Revised Statutes, the designation by the United States courts of the place at which their sentences of imprisonment shall be executed, is such a part of the sentence itself as to make the sentence absolutely void if there is error in the designation. In *Ex parte* Waterman (33 Fed. Rep., 29), Coxe J., referring to these statutes said (p. 30):

> But these provisions of Congress clearly recognize a distinction between a sentence and an order for the execution of the sentence. After the former has been

passed, the order is made designating the prison, but the *order* is not necessarily a part of the judgment of the court.

This seems to be a plausible view of section 5541 of the Revised Statutes, which provides that—

> In every case where any person convicted of any offense against the United States is *sentenced* to imprisonment for a longer than one year, the court by which the *sentence is passed* may order the same to be executed in any State jail or penitentiary.

II.

THE PETITIONER SHOULD NOT BE RELEASED ON HABEAS CORPUS, EVEN IF HE IS ENTITLED TO BE DISCHARGED ON WRIT OF ERROR. THE PRACTICE AT COMMON LAW IS WELL ESTABLISHED.

If I am right in claiming that an excessive sentence upon a lawful conviction is not void, but only erroneous, the petitioner's application must be denied, for the court has repeatedly declared that the writ of habeas corpus can not be used to perform the functions of a writ of error. (*Ex parte* Kearney, 7 Wheat, 38 (1822); *Ex parte* Watkins, 3 Pet., 193; *In re Schneider*, 148 U. S., 162, 166; *In re Frederich*, 149 U. S., 70, 75, and cases cited).

There is no authority in England for the use of the writ of habeas corpus to discharge a prisoner held under an excessive sentence. In 1847 Richard Dunn applied to the common bench for such a writ and it was refused, with the statement that it was the first case of the kind, and that there was no authority for it. (*In re* Richard Dunn, 5 C. B., 215.)

The prisoner in that case was detained under two warrants of commitment. The first warrant stated "that the defendant having this day been convicted of willful and corrupt perjury, he be committed to the Queen's prison, there to remain *until discharged by due course of law.*" The second warrant, after showing a sentence of imprisonment for eighteen months for a conviction of perjury, ordered that the prisoner give security to keep the peace for the space of two years, the said two years to be computed from the expiration of the said eighteen months, and that the prisoner be further imprisoned until such securities be given, and that he be committed to the keeper of the prison to be kept in custody in execution of the judgment. The first sentence in committing the prisoner to imprisonment *until discharged by due course of law* was bad for uncertainty, because there was no definite term of imprisonment; and the second sentence was equally bad, in requiring security under the conditions imposed, and in ordering imprisonment for failure to furnish it.

In the course of the argument of the prisoner's counsel, Maule, J., said (p. 217):

> You are here asking a court, that is not a court of criminal jurisdiction, for a habeas corpus, upon an opinion that a sentence pronounced by the court of Queen's Bench, which is still a subsisting sentence, is erroneous. Surely there is no authority for that.

To which the prisoner's counsel answered:

> If the sentence is not warranted by law, the prisoner is improperly detained and would be entitled to be discharged upon the return to the habeas showing a bad commitment. Besides, the securities should

> have been required from the expiration of the imprisonment of the party, and not from the end of the eighteen months. Otherwise, even a full pardon from the crown would not release him.

But the judgment of the court was delivered by Wilde, C. J., as follows:

> It is perfectly clear that the remedy of the prisoner in this case, if any, is by writ of error. If we were to accede to this application—which certainly is one of the first impression—it would lead to consequences that never were contemplated. It would follow, that every sentence pronounced by the court of Queen's Bench would be subject to be reviewed summarily, even by a judge at chambers.

The writ was denied.

The same ruling had been made twenty-three years before, by the supreme judicial court of Massachusetts.

In *Riley's Case* (2 Pick., 172) (1824), Riley had been sentenced to excessive imprisonment, and sued out a writ of habeas corpus. The court held that the prisoner could not be relieved on habeas corpus, as the statute excluded from the benefit of that writ "persons convict or in execution by legal process, civil or criminal." But that statute simply declares the common law and only repeats an express provision of the English habeas corpus act. (See Mr. Justice Bradley's opinion in *Ex parte* Parks, 93 U. S., 21.) Parker, C. J., said:

> We can not examine upon this summary process whether the additional punishment was rightly awarded or not. The proper mode of relief is by a writ of error.

the employ of the United States government in the office at Keokuk, Iowa, it will be demonstrated that the bed of the river, as shown by said plat and survey made prior to the construction of the Keokuk and Hamilton bridge, that at all points between the east and west abutment of said bridge at extreme low water there is an excess of three feet of water in the bed of said river. That the medium stage of water is six feet above low water; that during the medium stage of water there is no point beneath the Keokuk and Hamilton bridge where there is not nine feet of water. This certainly would indicate that the main channel of the Mississippi river, the main arm of the river between Keokuk, Iowa, and Hamilton, Illinois, is according to the great weight of the affidavits presented by the state of Iowa, and is, but for artificial obstructions, navigable from abutment to abutment.

We do not desire to go into the details of the affidavits at great length, but we call the attention of the court to the character of the men who compose the commission which located the boundary line. Two of the commissioners are now in the employ of the United States government. Their employment has caused them to be peculiarly qualified to have a knowledge as to the bed of the Mississippi river where crossed by the Keokuk and Hamilton bridge. Major Meigs, an engineer of more than ordinary prominence, and a man prominent in the improvement of the Mississippi river, who is assistant in charge ot the improvement of the Mississippi river from Quincy, Illinois, to Keithsburg, Illinois, a distance of 100 miles, was as well qualified as any man in the United States to perform the duties of such commissioner.

Mr. John R. Carpenter, also in the government employ, had the same familiarity with the subject as his colleague, Major Meigs, while Captain Wempner, a pilot of long standing, was peculiarly adapted, by occupation and

experience, to assist in the duties the commissioners were to perform. It was by reason of the high character and standing of the commissioners that the representatives of the state of Illinois and state of Iowa consented to their appointment, and we submit that their detailed statement should have more than ordinary weight with the court in determining whether or not the commissioners properly performed their duties.

The motion on behalf of the state of Illinois is supported by the affidavits of but five persons who claim any familiarity with the bed and channel of the Mississippi river. An examination of each of those affidavits should convince the court that, in the first place, affiants do not agree as to the location of the channel, and in the second place, they are of such a vague and indefinite character that a boundary line of a state could hardly be determined upon the statements contained in their affidavits.

For instance, the plat as made by Engineer McMath would indicate a channel from 400 to 600 feet wide.

H. S. Brown, id his affidavit says: "The deepest water is 250 feet from the Iowa shore."

Sobert Farris in his affidavit says; "The west line of the channel was where the pivot pier of the bridge now stands and extends 400 feet east from that point."

Owens makes the same statement in his affidavit. Wagoner makes the pivot pier the west bank of the channel and extends it 300 feet east.

McMath's profile shows the deep water as between 400 feet east of the pivot pier and deeper 250 feet east of that point than it is 250 feet west, thus fixing the deep water channel east of the point fixed by the pilots.

On this profile attention is called to the fact that there is deeper water right west of the commissioners' mark than at the pivot pier, which is given by some of the pilots

as being the west bank of the channel. None of the pilots in their affidavits explain the navigability of the river with reference to the ferry-boat landing and warehouses located upon the Illinois shore prior to the construction of the Keokuk and Hamilton bridge.

Captain Wempner. whose affidavit of 1891 is attached to the petition on behalf of the state of Illinois, by his affidavit (Complainant's record page 13) explains that a portion of his affidavit was made through inadvertence, and clearly shows by his personal knowledge that the river at the point in controversy was navigable from bank to bank.

In addition to the affidavits of the pilots, the affidavit of J. L. Miller, an attorney at law of Hamilton, Illinois, is produced. Mr. Miller seems to have been particularly industrious in engaging his brother-lawyers in private conversation, and then placing his opinion as to the effect of these conversations in the form of an affidavit

We submit that an affidavit of this character, which does not contain any statement of the facts as to the actual condition of the river, can have no weight, and can shed no light upon this controversy

The opinion of the Court of Appeals of the State of Illinois in case of Bertschi et al. vs. Keokuk and Hamilton Bridge Co., is attached to the petition on behalf of the state of Illinois. As this opinion was reversed by the Supreme Court of Illinois in the case reported in 34 N. E. 432, the reversal being upon the ground that the authorities of Illinois had taxed more than the proper proportion of the bridge in question, this opinion should have no weight in this controversy.

As opposed to the affidavits presented by the State of Illinois, the state of Iowa presents the affidavits of some twenty-five witnesses. These witnesses detail the facts within their personal knowledge. The detailed statement

as made by the commissioners will give the court a clear idea of the bed of the main arm of the Mississippi river at the point in controversy.

It would appear by the clear weight of the affidavits, and the state of Illinois has offered no affidavits to the contrary, that the great volume of water flowing down the bed of the Mississippi river passes between the west bank of island No. 4 and the east bank of the Iowa shore. That the bed of the river at this point is of solid rock, not subject to changes by deposit, and that said bed between said points is navigable during all seasons of navigation.

One principle ground for setting aside the commissioners' report as charged by the state of Illinois is that the commissioners in locating said line followed the rule laid down by the opinion of the Supreme Court of Iowa in case of Dunleith & Dubuque Bridge Co., 55 Ia. 558, and located the boundary midway between the Illinois and Iowa banks.

The commissioners clearly negative this in their affidavits and statement, and demonstrate that the line was not measured with reference to the banks, but said boundary line was located entirely with reference to the navigability of the stream. (Complainant's record, page 10.) The measurement in Illinois was made from 200 to 250 feet west of the shore line, and the measurement from the Iowa shore was made some fifty feet east of the shore line, and these two points west of the shore of Island No. 4, and east of the Iowa shore, were located with reference to the navigability of the river at and between said points. The result of their investigations and measurements gives to the state of Illinois some 1661 feet of bridge and approach from island No. 4, and about 1481 feet of bridge and approach to the state of Iowa, and as shown by the overwhelming weight of affidavits, the east and west starting point of said line and the water between same, as it ex-

isted before the artificial obstructions described in the affidavits, was navigable for all kinds of boats during all seasons of navigation.

Mr. H. B. Whitney in his affidavit (Complainant's record 39) and S. M. Ball, in his affidavit (Complainant's record 37,) say, that during the navigable seasons there was from five to seven feet of water at this point. Mr. W. R. Hamilton in his affidavit, and Judge Edmunds in his affidavit, (Complainant's record 28 and 31,) describe the character of the landing and the depth of water as same existed in the vicinity of the warehouse located prior to the construction of the bridge on the west bank of island No 4.

David Tipton in his affidavit (Complainant's record 39), and some of the other witnesses state that the water was deeper and the landing was better on the Illinois shore than it was on the Iowa shore.

Mr. Myers in his affidavit (Complainant's record 39) states that the boats would run up the middle of the river midway from shore to shore.

The affidavits of Charles Bartlett (Complainant's record p. 42), William Dobler (Complainant's record p. 54), Jacob Heinz (Complainant's record page 50), C. C. Carpenter (Complainant's record page 40), H. R. Dickinson (Complainant's record page 56) show that even at the present time, notwithatanding the artificial obstructions that have been placed in the river, that steamboats with tows of rafts go from the Iowa shore across to the east abutment of the Keokuk and Hamilton bridge, and land said rafts, used in the lumber trade, upon the west bank of island No. 4.

The profile of the bed of the river as identified by Mr. Willey, as has been heretofore referred to, shows the water at extreme low water mark, an unusual occurrence, to have been not less than three feet at all points

betwen the Iowa and Illinois shore. A medium stage of water, which is explained by said profile, and as shown by the statement of the commissioners, (Complainant's record, p. 21.) is six feet deeper than the stage of low water.

It would therefore appear by this profile prepared prior to the construction of the bridge, at a time when the artificial obstructions to navigation had not been constructed, that in the medium stage of water there was nine feet at all points as between the objective point taken from the east and west by the commissioners in locating the boundary liue.

The location of this boundary line has been in the nature of an arbitration in which the arbitrators have made their award. It is a disposition of a controversy in a manner well recognized by courts, and one which is sustained when parties enter into an arrangement of this character. We may be pardoned if we cite an expression from this Honorable Court as to the duty of courts in sustaining the settlement of controversies by agreement of the parties. In case of Burchell vs. Marsh, 17 How., 344, this court by Mr. Justice Grier, says:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or in fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, (Knox vs. Symmonds, 1 Ves., Jr., 369,) 'to induce the court to interfere, there must be some-

thing more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award.'"

"Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all to prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion."

In case of Kimberly vs. Arms, 129 U. S., 355, 9 S. C. R, 359, the case was referred to a master in chancery by agreement. This court in considering the finding of the master gave special weight to the fact that the reference was by agreement. In considering the effect of said finding the court compared same to a finding by arbitration. In the course of the opinion delivered by Mr. Justice Field, the court says:

"But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and be disregarded at the mere discretion of the court. A reference, by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration, a proceeding which is governed by special rules, is the sub-

mission of a controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an Independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed, uuder the reservations contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

The commissioners who made the findings in this case were in effect arbitrators chosen by the parties. They were appointed at the joint request of the parties interested in the controversy; the names of the commissioners were determined upon by consent of the parties, and their finding as made was agreed to by the representatives of both parties. They were men entirely competent to decide the question submitted to them; their decision is within the authority conferred upon them; the commissioners exhibited to the court their action in detail, which indicates that they acted fairly, impartially and intelligently in the matter, and this being in the nature of an arbitration, we contend that there is no such showing as would authorize the court to interfere with the judgment of the commissioners.

We confidently assert that the record as is disclosed in this proceeding establishes beyond controversy that the main channel of the Mississippi river at the point where crossed by the Keokuk and Hamilton bridge is substantially from the west bank of Island No. 4 to the Iowa shore, and was navigable from bank to bank. That prior to the construction of the government canal, navigation for any considerable distance north of the City of Keokuk and the City of Hamilton was obstructed by reason of the Des Moines rapids, and that boats of all classes and

character engaged in the general commerce of the river, landed with equal freedom at the Iowa and Illinois shore and crossed and recrossed the river without obstruction or hinderance at all places between said points.

The state of Illinois in this controversy seems to have had her rights fully and properly protected. The court in its original opinion laid down a clear and definite rule as to how the boundary line between the states should be ascertained. The states then agreed upon a commission of three honorable gentlemen, each of whom, it appears from the facts in the record, were peculiarly well qualified by occupation, education and experience to determine a question of the character at bar. Their detailed statement clearly indicates not only that they carefully studied, but they appreciated the opinion and the rule as therein announced by this courl. Their measurements were made in accordance with their best judgment. The plat indicating such measurements, and the boundary line made thereunder, has become a record of this court. The persons locally interested had full knowledge and information of the location of said boundary line at the time same was made. The proper officer of the state of Illinois authorized and directed a member of this bar to assent to the confirmation of said commissioners' report, under which authority a final decree of this court was rendered confirming the report of said commissioners. It appears by the overwhelming weight of the affidavits that the said boundary line was properly and fairly located. From the 10th of April, 1893, with full knowledge on the part of the authorities of the state of Illinois of the place where said boundary line was located, no steps were taken by them to change or modify the decree of this court as heretofore rendered.

We believe that no showing upon the merits has been made which would entitle the court to change or modify

the confirmation of said report. We further believe that the state of Illinois has no right, and this court has no jurisdiction, at this time in this proceeding, to grant the relief demanded.

The local contention between the municipalities bordering the river at this point should be finally and definitely determined, as we believe this court has already done.

We therefore respectfully but earnestly submit that the motion on behalf of the state of Illinois should be overruled and the petition supporting same should be dismissed.

Respecnfully submitted.

JOHN Y. STONE,
Attorney General of the State of Iowa.
JOHN F. LACEY,
FELIX T. HUGHES,
JAMES C. DAVIS,
Of Counsel.

151 U.S. 238

Office Supreme Court U. S.
FILED.
NOV 7 1893
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

STATE OF IOWA, *Complainant,*

vs.

STATE OF ILLINOIS, *Defendant.*

ANSWER OF THE STATE OF IOWA TO THE PETITION OF THE STATE OF ILLINOIS, IN SUPPORT OF MOTION ON BEHALF OF SAID STATE OF ILLINOIS, TO SET ASIDE THE REPORT OF THE COMMISSIONERS HERETOFORE MADE IN THIS CAUSE.

JOHN Y. STONE,
Attorney General, State of Iowa.

JOHN F. LACEY,
FELIX T. HUGHES,
JAMES C. DAVIS. } *Of Counsel.*

WM. REES & CO., PRINTERS, KEOKUK, IA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

STATE OF IOWA, *Complainant,*

vs.

STATE OF ILLINOIS, *Defendant.*

ANSWER OF THE STATE OF IOWA TO THE PETITION OF THE STATE OF ILLINOIS, IN SUPPORT OF MOTION ON BEHALF OF SAID STATE OF ILLINOIS, TO SET ASIDE THE REPORT OF THE COMMISSIONERS HERETOFORE MADE IN THIS CAUSE.

Now comes the State of Iowa, by John Y. Stone, Attorney General, and for answer to the petition of the State of Illinois, in support of its motion, filed in this cause on the 11th day of October, 1893, in which motion said State of Illinois seeks to have the order confirming the report of the commissioners set aside, respectfully represents :

1st. Said State of Iowa denies that this Honorable Court in this proceeding has jurisdiction to grant the relief asked by the State of Illinois in its said motion, and alleges that the order and decree of this Court confirming the report of the Commissioners

heretofore filed in this cause was entered on the 10th day of April, 1893. That said order and decree of this Court so confirming the report of said Commissioners was in the nature of a final decree so far as same referred to the boundary line between the State of Iowa and the State of Illinois, at the point where the Keokuk & Hamilton Bridge crosses the Mississippi River, said decree having been entered by this Honorable Court during the continuance and existence of the October Term, 1892, of this Court. That during said October Term, 1892, of this Court, no steps were taken by the State of Illinois to have changed, vacated, altered or modified said decree so confirming said report of said Commissioners, and no petition for rehearing or other proceeding was instituted by said State of Illinois during the continuance and existence of said October Term, 1892. That no proceeding looking to a modification of or vacation of said decree was commenced on behalf of the State of Illinois until the application to file the present motion, which was presented to this Honorable Court on or about the 11th day of October, 1893, long after the October Term, 1892, of this Court had expired.

It is, therefore, contended by the State of Iowa, that this Honorable Court has no jurisdiction and no authority upon summary motion, during the October Term, 1893, to alter, vacate or modify the final decree of this Court, made and entered during the October Term, 1892, of this Court.

2d. The State of Iowa, for further answer to the petition of the State of Illinois, alleges, that prior to the 10th day of April, 1893, M. T. Maloney, Attorney General of the State of Illinois, and the officer and

counsel for the State of Illinois, who has had charge of the case herein above described on behalf of the State of Illinois, had full and complete knowledge and notice that the said Commissioners, in accordance with their appointment and with the decree of this Honorable Court, had located the boundary line between the said States of Iowa and Illinois, and that said Commissioners' report had been forwarded to Washington for further action of this Honorable Court, and the State of Iowa alleges that the said M. T. Maloney, Attorney General of the State of Illinois, on the 26th day of March, 1893, by telegram, in words and figures, following, to-wit:

Mar. 26th, 1893. SPRINGFIELD, ILL.

W. I. HAYES, Cr. J. H. Cole, Wash'n.

You are authorized to appear in Sup. Court of U. S. in case of Iowa v. Illinois, and consent to the confirmation of the report of Commission as to line at Keokuk and Hamilton Bridge.

[Signed.] M. T. MALONEY.

authorized and directed Mr. W. I. Hayes, an attorney and counselor of this court, to appear for the State of Illinois and agree that this Honorable Court might confirm the report and action of the said Commissioners in locating said line between the State of Iowa and the State of Illinois.

The said state of Iowa further alleges that said order of confirmation of the report of said Commissioners was made, not only with notice to the said State of Illinois, but the said report was acquiesced in and agreed to by the said State of Illinois, through its said Attorney General.

The State of Iowa, therefore, alleges that the State of Illinois is now barred and estopped from objecting to the said order confirming said report of the Commissioners, and said finding and report of said Commissioners, as to the parties to this controversy, has become final and conclusive.

3d. And further answering, the said State of Iowa admits that on January 3d, 1893, a decree was entered in this cause wherein it was ordered, adjudged and declared by this Honorable Court that the boundary line between the said State of Iowa and said State of Illinois, was the middle of the main navigable channel of the Mississippi River.

Admits that on the 6th day of March, 1893, at the joint request of said State of Iowa and said State of Illinois, Montgomery Meigs, John R. Carpenter and Albert Wempner, were appointed as Commissioners by this Honorable Court to ascertain and locate said boundary line.

Admits that on the 30th day of March, 1893, the report of said Commissioners, prepared in writing, was filed in this Conrt, wherein they reported that the boundary line between the said State of Iowa and the said state of Illinois on the Keokuk & Hamilton Bridge had been located at a point 1041 65-100 feet east of the center of the draw span of said bridge.

The State of Iowa alleges that said report bears date March 23d, 1893, at which time said Commissioners had plainly marked upon said bridge said dividing line.

Admits that on the 10th day of April, 1893, by decree of this Honorable Court, the report of said Commissioners was duly confirmed, but denies that said

order of confirmation was made without notice to the State of Illinois, but on the contrary, charges and alleges, that said confirmation was made, not only with notice to the said State of Illinois, but by the consent and agreement of the said State of Illinois.

The State of Iowa, for further answer, alleges that the Commissioners in ascertaining and determining the said boundary line were governed by the opinion and decree of this Court, as entered in this cause, and avers that the boundary line as located by the said Commissioners was the middle of the main navigable channel of the Mississippi River, as same is located at a point where the Keokuk & Hamilton Bridge crosses said River.

Denies that said Commissioners were in ignorance of the terms and conditions of the decree and opinion of this Honorable Court.

Denies that said Commissioners willfully disregarded the decision and decree of this Court, or that they totally misunderstood same, but alleges that the middle of the main navigable channel of the Mississippi River at the point above indicated, except where impeded or obstructed by artificial means, is as was located and reported by said Commissioners, to-wit: at a point 1041 65-100 feet east of the centre of the pivot or draw span of the Keokuk & Hamilton Bridge.

In support of the allegations of this answer, the State of Iowa respectfully refers to and submits to the Court the affidavits plats and additional report of said Commissioners herewith attached.

Wherefore, having answered thus fully, the State of Iowa prays that the motion as made by the State

of Illinois be overruled, and the petition in support of said motion be dismissed.

JOHN Y. STONE,
Attorney General, State of Iowa.

JOHN F. LACEY,
FELIX T. HUGHES,
JAMES C. DAVIS.
} *Of Counsel.*

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS.

State of Iowa,
County of Clinton,
} ss.

Walter I. Hayes, being by me first duly sworn, deposes and says that he is an Attorney and Counselor at Law, and a member of the bar of this Court. That in March, A. D. 1893, he was employed and retained to represent the State of Iowa in the matter of the confirmation of the report of Commissioners to fix the boundary line between said States, at the Keokuk and Hamilton Bridge. That on the 26th day of March, A. D. 1893, he received a telegram from M. T. Maloney, who, as he then understood and now understands, was Attorney General of the State of Illinois, the original of which telegram is hereto attached and marked "Exhibit A." That acting under said telegram, and engagement by the State of Iowa, he appeared in this Court, made the motion for confirmation, and prepared the entry therein, and consented thereto in behalf of the State of Illinois. That in some way he conceived the idea that J. H.

Cole was an Attorney in this case, although his name does not so appear upon any of the briefs or other papers connected with this suit, and that acting upon this idea, he signed the name of said Cole as one of the attornies, and that said J. H. Cole had no knowledge thereof, and is not an attorney of any Court as he now understands.

WALTER I. HAYES.

Subscribed and sworn to before me and in my presence, by said Walter I. Hayes, this 30th day of October, 1893. Witness my hand and seal.

[SEAL] FRANK THORNBURG,
Notary Public in and for said County and State.

EXHIBIT A.

WESTERN UNION TELEGRAPH COMPANY.

* * * * * * * *

Number 47 ny. Sent by tz. Rec'd by Bn. 35 pd.

Received at Corcoran Bldg., S. E. Cor. 15th & F Sts., Washington, D. C., Mar. 26, 1893. Dated Springfield, Ill., 26:

To Walter I Hays, Cr. J. H. Cole, Washn.

You are authorized to appear in Sup. Court of U. S. in case of Iowa v. Illinois and consent to the confirmation of the report of Commissioner as to line at Keokuk and Hamilton Bridge.

M. T. MALONEY.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant*,
vs.
STATE OF ILLINOIS, *Defendant*.

No. 5 Original.
Oct. Term, 1893.

State of Iowa, }
Lee County, } ss.

We, Montgomery Meigs and John R. Carpenter, two of the Commissioners heretofore appointed by this Honorable Court, to mark the boundary line between the State of Iowa and the State of Illinois, do, herewith, present to the Court an additional statement as to the facts connected with the report heretofore made by us, and for that purpose, upon our respective and separate oaths, do say :

I, Montgomery Meigs, state that I am a resident and citizen of the City of Keokuk, Lee County, Iowa, and have been such citizen and resident since the year 1882 ; that during such period I have been in the employ of the United States government in connection with the improvement of the Mississippi River in the vicinity of Keokuk, Iowa, and Hamilton, Illinois ; that I am at present a United States government civil engineer, being assistant in charge of improving and operating the Des Moines Rapids Canal ; that I am also assistant in charge of the construction and improvement of the Mississippi River from Keithsburg, Illinois, to Montrose Iowa, and am further assistant in charge of the improvement of said River from Keokuk, Iowa, to Quincy, Illinois.

And I, I John R. Carpenter, on my oath, do state that I am a citizen and resident of the City of Keokuk, Lee County, Iowa, and am at present in the employ of the United States government as superintendent

of the improvement on the Mississippi River ; that I have been connected with the construction and operation in the vicinity of the City of Keokuk, Iowa, of the Des Moines Rapids Canal and river improvements on the Mississippi River, since the year 1870.

We, each of us, upon our respective oaths, do say that for many years last past we have been, by reason of our respective callings, by experience, observation and actual measurements, familiar with the bed of the Mississippi River at about the point where the Keokuk and Hamilton Bridge crosses said river ; that before proceeding with our respective duties as such Commissioners we obtained all the information that was possible to obtain by observation and inquiry as to the character of the channel and its location in the Mississippi River at said point so crossed by the Keokuk and Hamilton Bridge, and in the course of our investigation we examined authenticated maps and soundings made by the engineering corps of the United States army during the last fifty years, as well as other authenticated maps and soundings from surveys of said river prior to the construction of the Keokuk and Hamilton Bridge ; that in determining the point at which the boundary line as between said State of Iowa and said State of Iilinois should be located, we were controlled by the language of the opinion of the United States Supreme Court in the above entitled cause, the following paragraph being, as we understood, a summary of the opinion of the Court upon that proposition, to-wit :

" The true line in navigable rivers between the states of the Union which separate the jurisdiction of one from the other is the middle of the main channel

of said bridge, said abutment having been constructed about 700 feet into the river west of the original shore of Island No. 4, and then measured westerly to a point about 200 feet west of the abutment of the Iowa shore said abutment being about 250 feet east of the Iowa shore. The bed of said river between said points last above designated is composed of solid rock and in an average stage of water would have a least depth of about nine feet, and in extreme low water there would be a continuous depth, were it not for the artificial obstruction, in excess of three feet. The bed of the river at that point is composed of solid rock and the force of the current coming from the Des Moines Rapids above is sufficient to keep same free and clean from accumulations of sand and deposits unless same occurs from the artificial extension of the shore line, or obstructions, such as the dsposit of rock in the said river. That from the personal knowledge of your Commissioners, as well as from their investigations, they were satisfied, and so say upon oath, that prior to the obstruction of said river by artificial means, the Misissippi River between said points was navigable for boats that ordinarily navigate the Mississippi River at this point. That for many years prior to the building of the Keokuk and Hamilton Bridge, large ferry boats navigated said river over, along and across said point, some of said ferry boats being of sufficient capacity to accommodate, at one time, forty-four loaded teams, and said river about said point was navigable from the westerly shore of Island No. 4 to the easterly Iowa shore for said large boats at all seasons and times of the year, except when navigation was prevented by reason of ice in the river. That previous to the construction of said bridge, railroads had established a

depot on the west bank of Island No. 4, about 700 feet east of where said bridge terminates, and steamboats engaged in navigating said river made regular landings, received and discharged freight at said point.

Your Commissioners state that the whole width of the main arm of the Mississippi River between the points above specified, from which we took our measurements prior to the construction of the Keokuk and Hamilton Bridge, was the channel of navigation of the said Mississippi River. The said ferry boats with their numberless trips would far outweigh all of the other traffic on the said river, and your Commissioners further found that other boats engaged in ordinary commerce on the river used said channel at different points, and landed, received and discharged freight from the Illinois shore at or about a point 700 feet east from where said Keokuk and Hamilton Bridge abutment now rests.

The attention of your Commissioners has been called to a survey of the bed of the said Mississippi River, attached as an exhibit to the affidavit of Thomas McMath used in support of the motion to set aside the finding of your Commissioners. Said soundings seem to have been taken directly beneath the said Keokuk and Hamilton Bridge, and said map and survey does not correctly show the condition of the bed of said river as same would be were it not for certain artificial changes that have been made therein. The soundings made by Engineer McMath on September 13, 1893, were taken when the river was only 4-10 of a foot above extreme low water stage. This extreme low water stage was thus attained by the river in 1864, and has been only once

repeated since that time, except during ice gorges, when the river fluctuates rapidly and irregularly, and navigation is entirely suspended. Five feet below low water of 1864, is the grade established for the permanent improvement of the rapids, by the construction of the Des Moines Rapids canal, on which work nearly $5,000,000 has been already expended by the United States government. The present aim of the government engineers on open river improvements is to obtain a minimum channel of 4½ feet at extreme low water, and while such improvements have eliminated many difficult places in the river, there are many still remaining unimproved. In 1891 the low water of 1864 was repeated for the first time since that date. In that year there were places where there was but thirty inches in the channel, and at extreme low water, bars with but three feet of water over them were of not infrequent occurrence in the the ordinary channel of the river as used by steamboats. This depth of water is too low for the larger side wheel packets, but the larger stern wheel packets can keep up navigation, and do so, on three feet of water. Raft boats in general are built to draw about thirty inches of water, and these raft boats at present do at least nine-tenths of the actual commerce carried on on the upper Mississippi above St. Louis. Mr. McMath's profile shows that the general level of the river bed along the Keokuk and Hamilton Bridge is more than three feet at extreme low water, allowing for artificial obstruction now existing under said bridge.

Referring, again to the profile as made by Engineer McMath, at station 1400 as marked upon said map there is indicated a depth of but one foot and six inches. This shallowness at this point is occa-

sioned by the soundings having been taken upon the remains of a temporary pier located in 1881 to support two wooden spans that were put in in said bridge in the place of a long iron span that was destroyed by a collision with the steamer War Eagle in that year, said temporary pier having been only partially removed. The shallow water indicated in the vicinity of station 950 on said map is by reason of soundings having been taken upon a pile of rip rap rock thrown in to strengthen a pier of the bridge that had been moved out of line by the ice. In fact the accumulation of stone by ice movements, and by the obstructions placed in the river since and during the construction of said bridge, and scattered in the vicinity by the same agency, have to some extent changed the natural bed of said river from what it was before the construction of said bridge, and have caused accumlations in connection with said masses of rock, that may cast some doubt upon the accuracy of any profile of said river bed taken at this time. For many years the material dredged annually from the United States canal has been dumped just below the bridge and close to it, and this would result in more or less filling about said bridge. The deep water shown in Engineer McMath's plat in the vicinity of station 1600, is a hole or pocket in the bed of the river, which fades away in shallows a short distance above and below said point. From the investigation we were able to make, from a careful examination of well authenticated plats and soundings made of said river bed before the construction of said bridge, from personal intercourse with men who were well acquainted with the channel of said river prior to the construction of said bridge, and from our own personal

knowledge and experience, we conclude that under the provisions of the opinion of this Court in the above entitled cause, the main channel of the Mississippi River which was navigable for steamboats that ordinarily navigate said river,—eliminating from same recent artificial obstructions—is between a point 500 feet east of the easterly end of said bridge, and 200 feet west of the westerly end of said bridge.

We further desire to say that we have absolutely no interest of a personal character whatever in this matter; that we were not approached or spoken to by any attorney, agent or officer of the Keokuk and Hamilton Bridge or of the State of Iowa prior to our appointment or subsequent thereto, except as we may have had occasion to call upon said officers for information or records in their possession. That the Superintendent of the bridge, Mr. John H. Cole, expressly stated to us that the place where the boundary line was marked by said Commissioners was a matter that was entirely immaterial to the Bridge Company; their only desire being that the same should be definitely and permanently fixed.

We further desire to state that we gave the opinion of this Honorable Court careful consideration, and our measurements and determination of the boundary line were made as we believed in exact accordance with the letter and spirit of said opinion. That in pursuance of our appointment as Commissioners in the above entitled cause, we completed our report as Commissioners on the 23d day of March, 1893, and on the 23d day of March, 1893, after properly signing and verifying same, said report was forwarded to the Clerk of this Honorable Court and

at the time of completion of said report we plainly marked upon the structure of the Keokuk and Hamilton Bridge a line which would indicate the boundary line between said State of Iowa and said State of Illlnois.

MONTGOMERY MEIGS.
JOHN R. CARPENTER.

Subscribed and sworn to before me, this 30th day of October, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant*,
vs.
STATE OF ILLINOIS, *Defendant.*
} No. 5 Original.

State of Iowa, }
Lee County, } ss.

I, Albert Wempner, upon my oath, duly administered, do depose and say:

That I am one of the Commissioners heretofore appointed by this Honorable Court in the above entitled cause, to locate the boundary line between the State of Iowa and the State of Illinois; that I am by profession a pilot of the Mississippi River, having had since 1852 continuons experience in navigating said river at various points from St. Louis, Mo., to St. Paul, Minn.; that I am the same Albert Wempner who made an affidavit on behalf of the State of Illinois in the controversy pending in the State Court of said State, a copy of said affidavit appears in con-

nection with the motion on behalf of the State of Illinois to set aside the report of the Commissioners heretofore made. That I have not had submitted to me the original of said affidavit and as to the correctness of the copy I am unable at this time to state. I state, however, that the said affidavit said to have been made by me on or about the 25th day of April, 1891, was made, to some extent, upon a misapprehension of the facts; that while acting as pilot upon the Mississippi River, boats engaged in the carrying trade, going north of the City of Keokuk, as a matter of convenience, ordinarily selected a channel running nearer the Iowa shore than to the Illinois shore; that where my affidavit states "that said boats could not go easterly at a point in the vicinity of the Iowa shore in said channel," I was mistaken, and that portion of the affidavit was not called to my attention at the time of making same, as I have personally known for a great many years that the Mississippi River at a point between Keokuk, Iowa, and Hamilton, Illinois, at the place where the Keokuk and Hamilton Bridge is located, was prior to the location of the bridge, navigable for steamboats engaged in the commerce of said river. I had personal knowledge of the fact that large ferryboats made many trips daily between said points. I know of the location of warehouse and steamboat landing on the westerly bank of Island No. 4, some 700 feet east of the present Illinois abutment of the Keokuk and Hamilton Bridge; that boats engaged in the ordinary commerce on said river, landed at said warehouse for the purpose of discharging and receiving freight; that when appointed as a Commissioner by this Court, I made a careful examination of the bed of said river, examining plats, and surveys of the bed of same, with a view

of ascertaining the middle of the main navigable channel of the Mississippi River at the point where the Keokuk and Hamilton Bridge is located; that after making said particular examination I became ~~came~~ satisfied that the middle of said navigable channel, eliminating artificial obstructions, was at a point midway from a point 500 feet east of the easterly or Illinois abutment of said bridge and a point 200 feet westerly from the west abutment of said bridge, and so believing, in connection with the other Commissioners appointed in said cause, we located the boundary line between the State of Iowa and said state of Illinois at such point.

I further state that I have read the additional report and statement as made by Montgomery Meigs and John R. Carpenter, bearing date October 30th, 1893, and I believe that the facts stated in said additional report and the conclusions arrived at in said report, are true and correct.

ALBERT WEMPNER.

Subscribed and sworn to before me, this 31st day of October, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant,*
vs.
STATE OF ILLINOIS, *Defendant.*
} No. 5 Original.

State of Iowa,
Lee County, } ss.

I, John R. Carpenter, upon my oath, do say, that I am the John R. Carpenter who acted as one of the Commissioners in this cause; that subsequent to